

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs September 24, 2008

**STATE OF TENNESSEE v. DAMIAN R. KELLY**

**Appeal from the Circuit Court for Blount County**  
**No. C-15952 Michael H. Meares, Judge**

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**No. E2007-02299-CCA-R3-CD - Filed November 4, 2008**

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The Defendant, Damian R. Kelly, was convicted of one count of aggravated sexual battery, a Class B felony, and sentenced as a Range I, standard offender to ten years in the Department of Correction. On this direct appeal, he contends (1) that the trial court erred in allowing the investigating detective to testify regarding his interpretations of the Defendant's credibility based upon his physical gestures; and (2) that the trial court erred in using as a sentencing enhancement factor its finding that the Defendant committed the crime to gratify his desire for pleasure or excitement. After review, we conclude that the trial court did not commit reversible error. Accordingly, we affirm the Defendant's conviction and sentence.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

DAVID H. WELLES, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JERRY L. SMITH, J., joined.

J. Liddell Kirk, Knoxville, Tennessee, for the appellant, Damian R. Kelly.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; Mike Flynn, District Attorney General; and Robert Headrick, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**Factual Background**

At the time the offense was committed, the victim, D.A.,<sup>1</sup> lived with her mother, the Defendant, and five of her siblings in the Defendant's mobile home, having moved there in July, 2003. The mobile home was located in the Sleepy Hollow Trailer Park in Friendsville, Tennessee.

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<sup>1</sup>It is the policy of this Court to refer to minor victims by their initials.

The victim's mother, Kimberly Atkins, had been romantically involved with the Defendant for about eight years. The victim was ten years old at the time of the crime; her siblings were nine, six, four, three, and two. The Defendant is the biological father of the victim's four youngest siblings. Although the Defendant is not the victim's biological father, she considered him a father figure.

Ms. Atkins testified that, as of early 2006, she and the Defendant had been having "problems." She had been thinking of leaving him but had said nothing to her children. At the time, she worked about forty hours a week as co-manager of a nearby Little Caesar's Pizza restaurant, while the Defendant stayed at home to watch the children. At about 3:00 a.m. on April 1, 2006, she returned from work to find that the victim had a burn on her wrist and hand, sustained when one of the victim's young siblings accidentally touched her with a hot iron the previous evening. Upset that the Defendant had not called her at work to tell her about this injury, but also judging that the burn was not an emergency, Ms. Atkins went to sleep.

When she woke up later that morning, Ms. Atkins took one of her children to a birthday party. When she returned, she found that two of her remaining five children had covered themselves in their own feces, and that the Defendant had done nothing to stop them or clean them up. At this point, she decided to leave the Defendant. She gave the two children a bath, and then put all five of her children in her car. After dropping four of the children off at a friend's house, she and the victim drove toward Blount Memorial Hospital.

On the way to the hospital Ms. Atkins asked the victim whether she understood the difference between appropriate and inappropriate touching. As Ms. Atkins explained at trial:

A friend of mine had said that [the victim] was acting a little strange—or differently towards her husband and her two sons, because we were really good friends with them. And she used to not think twice about going up, giving them a hug, or sitting down like on the floor in between their legs, playing with all the other kids, sitting there playing games and everything. And she wouldn't go around them anymore.

The victim responded that she did understand the difference. Ms. Atkins then asked the victim if the Defendant had ever touched her inappropriately. The victim responded that he had, but she appeared reluctant to elaborate. Not wanting to subject the victim to the same questions she knew police would ask later, Ms. Atkins simply continued driving. She reported the abuse while emergency room doctors attended to the victim's burn. Two uniformed officers arrived shortly thereafter to take her information. At no time thereafter did Ms. Atkins or any of her children return to the Defendant's mobile home.

On either the second or third of April, the case was assigned to Detective Sergeant Doug Moore of the Blount County Sheriff's Department and to Brent Howard of the Tennessee Department of Children's Services (DCS). Howard conducted an interview with the victim in the DCS Child Advocacy Center. Det. Sgt. Moore observed, and he testified that the victim's statements in the interview were substantially similar to the victim's trial testimony.

The victim testified at trial that the Defendant touched her on her “boobs” and on her “private,” meaning her “pee-pee,” on three occasions between November 24, 2005, the birthday of one of her brothers, and February 12, 2006, Ms. Atkins’ birthday. On each occasion, the victim was home sick from school and sleeping in the bed Ms. Atkins and the Defendant shared. On each occasion, the Defendant, with whom the victim was alone in the mobile home, came into the bedroom, locked the door behind him, and laid down next to the victim before touching her inappropriately. On two occasions, the Defendant touched the victim under her clothes; once he did not. The victim was unsure exactly when in the given time frame the incidents occurred, although she testified that more than a week certainly passed between each of them. On each occasion, the Defendant told the victim “don’t tell anybody.”

After hearing the victim’s story, Det. Sgt. Moore testified that he called the Defendant and asked him to come to the Sheriff’s Office. The Defendant did so on April 5, 2006. Detective Sergeant Moore, although making it clear to the Defendant that he was free to leave and would not be arrested that day, read him his rights as set forth in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct 1602 (1966). The Defendant also signed a Miranda waiver form. After attempting to establish a rapport with the Defendant, Det. Sgt. Moore asked him about his relationship with the victim. At this point, Det. Sgt. Moore said the Defendant began to exhibit indicators of deception, including “self-grooming” behaviors, and a tendency to put his hands in his pockets. He also made statements that piqued Det. Sgt. Moore’s interest, predominantly the Defendant’s decision to volunteer that he “[didn’t] remember having sex with [the victim].” The entire interview with the Defendant was recorded on video and shown to the jury at trial. A transcript of the interview was also provided to the jury.

Detective Sergeant Moore persuaded the Defendant to reduce to writing his recollection of any sexual contact he had with the victim. The Defendant wrote out a statement, marked “12:40 pm,” stating as follows:

I was asleep on the bed when I felt a disturbing feeling. Lights were of [sic] I moved my hand in front and felt a sensation on my private. When I did I felt a crotch then to my surprise it was my daughter [the victim] I then pushed her to the side. Jumped up and went to my bathroom. I ejaculate mostly to get rid of the boner. When I came out I said what were you doing? She said that’s how they do it on T.V.

The Defendant also wrote out a second statement, marked “12:45 pm,” stating as follows:

I was asleep on my bed. Light [sic] were off T.V. was on. I felt a body lay on me. I moved my hand above my crotch to feel another crotch. I then pushed her aside, went in the bathroom. I jacked off.

The Defendant chose not to testify. A jury convicted the Defendant of one count of aggravated sexual battery, a Class B felony. The trial court sentenced the Defendant to ten years in the Department of Correction. He now appeals.

## Analysis

### I. Detective Sergeant Moore's Testimony

The Defendant first argues that the trial court should have excluded some of Det. Sgt. Moore's testimony as irrelevant. The determination of whether evidence is relevant is governed by Tennessee Rule of Evidence 401. Trial courts have broad discretion in assessing relevance, and we will not overturn their decisions absent an abuse of discretion below. State v. Stinnet, 958 S.W.2d 329, 331 (Tenn. 1997), State v. Dubose, 953 S.W.2d 649, 653 (Tenn. 1997). The trial court's exercise of discretion may not be reversed unless the court "applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997).

Specifically, the Defendant objects to the admission of Det. Sgt. Moore's testimony that, in his opinion, the Defendant exhibited deceptive behaviors, and that he believed the Defendant's version of events was an attempt to minimize what happened. He argues that this testimony was irrelevant because, rather than offering evidence, it merely suggested an evidentiary interpretation to the jury. Further, he contends that the testimony was not harmless because it invaded on the jury's exclusive right to make credibility determinations regarding the Defendant's intention, an issue central to his guilt or innocence. See Tenn. Code Ann. § 39-13-504(a) (requiring "unlawful sexual contact" as an element of aggravated sexual battery); Tenn. Code Ann. § 39-13-501(6) (noting that "sexual contact" requires "intentional touching").

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. Only relevant evidence is admissible. See Tenn. R. Evid. 402. Detective Sergeant Moore testified regarding facts he observed which he believed reflected on the credibility of the Defendant as the Defendant gave his statement, an issue of consequence to this case. We conclude that the trial court did not abuse its discretion in its relevancy determination.

Although the Defendant casts his argument solely as a relevancy issue, we note that the witness also testified regarding his opinion of how certain "body language" exhibited by the Defendant reflected on the Defendant's credibility. Even though the witness was asked about his training and experience involving interviewing witnesses and interrogating suspects, he was not properly qualified as an expert witness. See Tenn. R. Evid. 702. Also, because he was asked for his opinions based on his specialized training and experience, his opinion was not being sought as a lay witness. See Tenn. R. Evid 701; see also State v. Timothy Murrell, No. W2001-02279-CCA-R3-CD, 2003 WL 2164591, at \*6 (Tenn. Crim. App., Jackson, July 2, 2003) (lay opinion testimony under Rule 701 is limited to observations of the lay witness that are not based on scientific, technical or other specialized knowledge).

Nevertheless, we conclude that any error of the trial court in allowing this testimony was harmless. Tennessee Rule of Criminal Procedure 52(a) states that "[n]o judgement of conviction

shall be reversed on appeal except for errors which affirmatively appear to have affected the result of the trial on the merits.” Here, the jury viewed a videotape of Det. Sgt. Moore’s entire interview with the Defendant, and were provided with a transcript to assist them in analyzing it. The jury thus had all of the evidence necessary to make its own credibility determinations. In our view, the admission of Det. Sgt. Moore’s opinion testimony does not affirmatively appear to have affected the result of the trial on the merits. The Defendant is not entitled to relief on this issue.

## **II. Sentencing Factors**

The Defendant objects to the court’s use of its finding that his offense “involved a victim and was committed to gratify [his] desire for pleasure or excitement.” Tenn. Code Ann. § 40-35-114(7). On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. See Tenn. Code Ann. § 40-35-401, Sentencing Comm’n Comments; see also State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). When a defendant challenges the length, range, or manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that the determinations made by the court from which the appeal is taken are correct. Tenn. Code Ann. § 40-35-401(d). However, this presumption “is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Pettus, 986 S.W.2d 540, 543-44 (Tenn. 1999); see also State v. Carter, 254 S.W.3d 335, 344-45 (Tenn. 2008). If our review reflects that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see also Carter, 254 S.W.3d at 344-45.

In conducting a de novo review of a sentence, this Court must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (f) any statistical information provided by the Administrative Office of the Courts as to Tennessee sentencing practices for similar offenses; and (g) any statement the defendant wishes to make in the defendant’s own behalf about sentencing. Tenn. Code Ann. § 40-35-210(b); see also Carter, 254 S.W.3d at 343; State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002).

The Defendant was convicted of a Class B felony. Tenn. Code Ann. § 39-13-504(b). He was found to be a Range I, standard offender, therefore subject to a sentencing range of eight to twelve years. Id. § 40-35-112(a)(2). Tennessee Code Annotated section 40-35-114 lists the enhancement factors a sentencing court shall consider in determining which sentence to impose inside the prescribed range, but provides that each factor should be considered only “if appropriate for the offense and not already an element of the offense.” The court is not bound by these factors, however. Id. § 40-35-114. The Defendant correctly argues, and the State concedes, that gratification of the Defendant’s desire for pleasure or excitement has been held to be an element of aggravated sexual battery, and was thus improperly considered in sentencing. See State v. Kissinger, 922 S.W.2d 482, 489 (Tenn. 1996) (stating that “sexual battery requires that the touching be for the purpose of sexual arousal or gratification,” meaning it “necessarily includes the intent to gratify a

desire for pleasure or excitement” and “cannot be used to enhance the sentences of sexual battery and aggravated sexual battery”).

The court used other factors in reaching its sentencing decision, however. It found, based on an out-of-state conviction, that the Defendant had “a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range.” Tenn. Code Ann. § 40-35-114(1). It also found that the Defendant “abused a position of public or private trust.” Id. § 40-35-114(14). Finally, it found as a mitigating factor that the Defendant’s conduct “neither caused nor threatened serious bodily injury.” Id. § 40-35-113(1).

Having reviewed Tennessee Code Annotated sections 40-35-102 and -103, we conclude that the Defendant’s sentence of ten years is consistent with their purposes and principles, even when unsupported by the enhancement factor erroneously considered by the trial court. We therefore grant no relief on this point of error.

### **Conclusion**

Based on the foregoing authorities and reasoning, we affirm the Defendant’s conviction and sentence.

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DAVID H. WELLES, JUDGE